No. 3032

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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SWAYNE & HOYT, INCORPORATED,
*Plaintiff in Error,*

vs.

LEONARD EVERETT,
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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PERNAU-WALSH PRINTING CO.

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### Statement of the Case.

On May 17, 1916, Leonard Everett, an American citizen resident in Shanghai, China, and an agent there of German subjects and interests, filed this suit in the United States Court for China against Swayne & Hoyt, Incorporated, a corporation of the State of California, with its principal office and place of business in San Francisco, having as its agents at Shanghai, Jardine, Matheson & Company, Limited, a British corporation. The suit is for the recovery of damages upon the claim that the defendant* in dereliction of its duty as a com-

* For brevity's sake, plaintiff in error and defendant in error are herein referred to as defendant and plaintiff, respectively, as they were in the court below.

mon carrier declined, without lawful excuse, to receive certain cargo offered by plaintiff for shipment from Shanghai to Pacific Coast ports by the Steamer "Yucatan" which had been advertised as to be on the berth at Shanghai for freight to San Francisco.

By demurrer defendant presented the contention that it appeared upon the face of the petition that the court was without jurisdiction over defendant's person. The demurrer was overruled and the order of the court in that behalf is assigned as error. The first point relied upon by plaintiff in error on this writ of error will accordingly be the jurisdictional question.

The second point (and only two main points are involved) goes to the merits, and is that defendant committed no tort or breach of legal duty to plaintiff, being, under the facts disclosed by the case, lawfully excused and exonerated from what might otherwise have been its duty as a common carrier to accept for shipment the goods proffered by plaintiff.

The court below held against defendant, awarding plaintiff damages in the sum of $2,700. Assuming defendant to have been liable, no exception is taken to the amount of the award. But it is submitted that the court was in error in finding defendant liable at all.

The facts were as follows:

Jardine, Matheson & Company, Limited, advertised in the public press of Shanghai from about April 18, 1916, to about May 5, 1916, that the "Yucatan" would be put on the berth at that port and that applications for freight for a voyage to the port of San Francisco

might be made to them. They were the agents at Shanghai for Swayne & Hoyt, Incorporated, (defendant) who had the "Yucatan" under charter for a voyage from San Francisco to China and Japan and return to San Francisco and other Pacific Coast ports of the United States. Swayne & Hoyt, Incorporated, was a California corporation. Jardine, Matheson & Company, Limited, was a British corporation. The "Yucatan" arrived at Shanghai on May 13, 1916. Prior thereto, and namely on May 3, 1916, Leonard Everett (plaintiff) applied to Jardine, Matheson & Company for space on the "Yucatan" for shipment of cargo on the voyage in prospect. At first the application was refused outright, but afterward Jardine, Matheson & Company agreed to accept the proffered cargo, provided it should be passed by the British Consul at Shanghai and provided plaintiff should not offer more cargo than the space at the disposal of the ship. Plaintiff objected to the former condition and demanded that his cargo should be accepted without it. Jardine, Matheson & Company declined to comply with the demand, the cargo in question was not shipped by the "Yucatan," and the suit followed.

Great Britain and Germany were at the time at war. As British subjects, defendant's agents, Jardine, Matheson & Company, were prohibited and prevented by British law and orders in council and by rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects or their agents. As a part of his

business as shipping agent, plaintiff had accepted cargo from German subjects and the cargo he offered for the "Yucatan" came into his possession from German subjects, and he received his instructions as to its shipment from German subjects. This cargo defendant's agents, Jardine, Matheson & Company, were prohibited and prevented by the authorities of the British Government from accepting and shipping; nor were they permitted by their said government to have any business dealings with plaintiff.

There is no showing in the record that defendant, Swayne & Hoyt, Incorporated, had any knowledge of this incapacity of their agents.

It was the contention of Swayne & Hoyt, Incorporated, as defendant below, and is its contention as plaintiff in error here that under these circumstances it is not liable, though admittedly a common carrier, for the non-acceptance of the cargo tendered by plaintiff.

Two main points then are, as we have suggested, involved in this writ of error: first, whether the United States Court for China had jurisdiction over the person of the defendant; second, whether defendant, though a common carrier, was, in view of the *incapacity* (not, be it observed, as the court below erroneously assumes, *default* or *misconduct*) of its agents, obligated to receive plaintiff's cargo, the agents' incapacity being due to causes beyond their control, namely, the inhibition of their government, and not proved to have been known to their principal (the defendant).

## Specifications of Error.

Accordingly, the errors assigned and relied upon are (quoting from the assignment of errors), as to the first point,—

> 1. "That the court erred in overruling defendant's demurrer to plaintiff's petition,—
>
> "First: Because it appears upon the face of said petition that the court has not jurisdiction over the defendant corporation.
>
> "Second: Because an American corporation not regularly established in business in China and having no office, place of business or property in China and conducting such business as it may do in China through agents who are British subjects is not within the extraterritorial jurisdiction in China of the United States or of the United States Court for China in the sense such extraterritorial jurisdiction is understood, created or established by the treaties between the United States and China or the statutes of the United States creating and prescribing the jurisdiction of the United States Court for China."

And as to the second point,—

> 2. "The court erred in its judgment in holding and deciding that the fact that the British agents in China of defendant were prevented by British trading with enemy regulations and by the British law and authorities from accepting cargo for shipment by defendant's steamship did not exempt defendant from its liability as a common carrier to accept cargo tendered by plaintiff.
>
> 3. "The court erred in its judgment in not holding and deciding that any law or rules or regulations to which defendant's agents in a foreign country (China) are subject which make it unlawful for said agents to accept cargo from plaintiff for shipment by defendant's vessel exonerates

defendant from liability to plaintiff for the acts of its agents in refusing to accept such cargo.

4. "The court erred in its judgment in holding and deciding that defendant was not prevented from accepting plaintiff's cargo by causes beyond the control of defendant of such a character as to exempt defendant from liability to plaintiff."

And, as to both points,—

5. "The court erred in entering judgment against the defendant and in favor of the plaintiff.

6. "The court erred in not entering judgment in favor of the defendant and against the plaintiff."

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## Brief of the Argument.

### I.

**THE UNITED STATES COURT FOR CHINA WAS WITHOUT JURISDICTION OVER THE PERSON OF THE DEFENDANT. THE DEMURRER TO THE PETITION SHOULD HAVE BEEN SUSTAINED.**

The United States Court for China derives its jurisdiction from the act creating it (Act of June 30, 1906, c. 3934; 34 St. at L. 814; U. S. Compiled Stats. 1916, Vol. 7, Sec. 7687 ff., p. 8165), Section 1 of which act gives it "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this Act." The last-mentioned section simply continues the consuls' jurisdiction in minor criminal and civil cases. To determine, therefore, the

jurisdiction of the United States Court for China, we have to look to the jurisdiction vested in the United States consuls and ministers in China under the applicable United States statutes and the treaty between the United States and China. Jurisdiction in civil cases was conferred upon such officers by Section 4085 of the Revised Statutes (U. S. Compiled Stats. 1916, Vol. 7, Sec. 7635, p. 8145) as follows:

> "Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively."

The treaties referred to are those with China, Japan, Siam, Egypt and Madagascar, but we are concerned here only with the treaty with China. It must be examined because Section 4085 of the Revised Statutes quoted above gives the consular and ministerial courts only such jurisdiction over "controversies between citizens of the United States, or others," as is "provided for by such treaties, respectively," viz., for present purposes, by the treaty with China.

This is the Treaty of June 18, 1858, and provides, so far as pertinent in this connection:

> "All questions in regard to rights, whether of property or person, arising *between citizens of the United States in China,* shall be subject to the jurisdiction and regulated by the authorities of their own government." (12 U. S. Stats. at Large, 1029.) (Italics ours.)

This was a controversy between citizens of the United States (Leonard Everett, plaintiff, an American citizen, and Swayne & Hoyt, Incorporated, defendant, a California corporation), but, so far from its being a controversy between citizens of the United States *in China* the petition, while positively alleging the plaintiff to be a resident of Shanghai and there engaged in business, avers with equal positiveness that the defendant not only was a California corporation, but had "its principal office and place of business at San Francisco, in said state" (Paragraph 2 of Petition), namely, was there domiciled or resident.

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## II.

### DEFENDANT, THOUGH A COMMON CARRIER, WAS, UNDER THE CIRCUMSTANCES OF THIS CASE, LAWFULLY EXCUSED FROM ACCEPTING THE CARGO PROFFERED BY PLAINTIFF.

**The duty of a common carrier to accept goods for transportation is not absolute. Various grounds of lawful excuse.**

> "There are goods which he is not bound to carry at all, and there may be circumstances which will excuse him from carrying goods even of the kind which he is engaged generally in carrying and

> which generally he is bound to carry. *He may therefore sometimes lawfully refuse to accept the goods;* * * *" (Italics ours.)
>
> *Hutchinson on Carriers,* Third Edition, Vol. I, Sec. 143, p. 152.

> "Nevertheless the duty to accept for carriage and to carry goods tendered is not an absolute duty on the part of a carrier, but is subject to reasonable limitations and conditions. * * * The duty of the carrier does not extend to the acceptance and the immediate transportation of freight at all hazards and in all circumstances."
>
> *10 C. J.,* 66.

As the court below very rightly says (Trans. 23), the act of God or of the public enemy will justify the carrier in refusing to carry proffered goods—just as of course they exonerate him from liability for their loss. So also carriers are bound to carry only according to the profession they make (*Oxlade v. N. E. Ry.,* 15 C. B. (N. S.) 680; *Johnson v. The Midland Railway Company,* 4 Exch. 36; *Hutchinson on Carriers,* Third Edition, Vol. I, Sec. 144, p. 152). Likewise, press of business (*Hutchinson,* supra, Sec. 146, p. 154; 10 C. J. 67), the dangerous or prohibited character of the articles intended to be shipped (*10 C. J.,* 67), mob violence (ibid.) and various other causes (*10 C. J.,* 68; *Hutchinson,* supra, Sec. 147, p. 155) will excuse the carrier for non-acceptance of goods offered for shipment.

**Strikes even among the carrier's own employees will excuse the carrier if reasonably beyond its power to control. The court below in error.**

> "A strike on the line of the carrier greatly embarrassing and in some instances preventing the

> movement of its trains constitutes a sufficient ground for its refusal to accept goods for transportation."
>
> *10 C. J.*, 67.

With all respect to the court below, we must insist that its theory (Trans. 23-24) of a distinction in legal effect between strikes *not among* and strikes *among* the carrier's employees is untenable. The question is not who were striking, but whether the strike was reasonably beyond the power of the carrier to control. In other words, the doctrine that strikes will exonerate the carrier if it cannot stop them is but a phase of the broader and, of course, recognized doctrine that a carrier is not liable for non-acceptance of cargo where the non-acceptance is properly attributable to causes beyond the carrier's control.

The court says (Trans. 24) that

> *Murphy Hardware Co. v. Southern Ry. Co.*, 150 N. C. 703, 64 S. E. 873,

is the only case it has been able to find to the effect that a strike of the carrier's own employees will afford such excuse and adds that there is older and ampler authority for the contrary doctrine. Strikes belong to relatively modern history, so that we question whether antiquity necessarily goes hand in hand in this instance with validity, and we respectfully dispute that the authority is ampler that only strikes not among the carrier's own employees will lawfully qualify its duty. In addition to the case above cited recognizing a strike even among the carrier's own employees as coming

within the scope of the doctrine, we would ask attention to the following authorities:

*Geismer v. Lake Shore & Michigan Southern Railway Company,* 102 N. Y. 563; 55 Am. Rep. 837;

*Pittsburg, Cincinnati & St. Louis R. W. Co. v. Hollowell,* 65 Ind. 188; 32 Am. Rep. 63.

True it is that these cases refer to so-called *former* employees, but all employees who strike become by that very act *instanter former* employees, so that the distinction, even if it be of intent, has no meaning.

In

*Galveston H. & S. A. Ry. Co. v. Karrer* (Texas Civil Appeals), 109 S. W. 440,

a strike among the carrier's own employees was held a good defense for a failure of the company to receive animals offered for shipment, and the court found

> "that the pleading sufficiently set forth the defense of inability to transport the cattle, and it was not necessary for the company to show that the strike could not have been prevented by either the company or the civil authorities, or that the strike was then pending, causing at the time of the delay a total stoppage of transportation, and that the defendant could not control the same by any means at defendant's command, nor that the state, after being applied to by defendant, could not control said strike, and the allegations were sufficient to form a basis for proof of reasonable diligence." (Quoting from syllabus, 109 S. W. 440.)

In other words, the question is not whether the strike was of the carrier's own employees or of others, but whether it was *reasonably* (and reasonably only, not

absolutely, be it noted) within the power of the carrier to control. In their true light, then, strikes as a lawful excuse to the carrier are simply one aspect of "causes beyond the carrier's control" as a ground of exemption from liability for non-acceptance of offered cargo. And such a cause was the reason for plaintiff's failure to carry defendant's cargo in the case at bar.

**The failure of defendant to accept plaintiff's cargo was due to a cause beyond its control.**

The court below states (Trans. 28) that "no precedent on all-fours with this case has been cited or found". The situation was indeed novel. Defendant's agent in Shanghai was Jardine, Matheson & Company, a British corporation. Plaintiff had theretofore "accepted cargo from German subjects" and "the cargo mentioned in the petition herein came into his possession from German subjects" and "he received his instructions as to shipment of the same from German subjects" (all this on his own admission—Replication —Trans. 16). Under these conditions, Jardine, Matheson & Company were forbidden by the English Trading with the Enemy Acts and the authorities of the British Government and its rules, regulations and decrees and orders in council from dealing with plaintiff or accepting the cargo offered by him for shipment.

We thus have a case of *incapacity* (not *fault* or *misconduct* as the court below constantly suggests) on the part of defendant's regularly appointed agents in Shanghai.

This incapacity was not a matter within the control of the agents, but was imposed on them regardless of

their wishes by a power from without, viz., the command of the British Government with which they, as British subjects, were bound to comply. The plaintiff was the agent of German subjects, he had been representing German interests prior to this litigation, and the British Government accordingly forbade its subjects to have dealings with him just as in common knowledge the American Government is now with far greater severity, as everyone knows, than England blacklisting neutrals who trade with Germany—the common enemy. The cause was, therefore, beyond the control of Jardine, Matheson & Company.

The court says that the inability of defendant to receive plaintiff's cargo was not, however, due to causes beyond *defendant's* control because it might have changed its agents and selected others who would not labor under the incapacity which Jardine, Matheson & Company suffered. But that requires that defendant should have known the situation either actually or constructively and the record discloses no such knowledge. There is no proof that defendant actually knew, and the burden was on plaintiff to make that proof because there is, under the facts of this case, no presumption of such knowledge.

This brings us to the point of sharp divergence from the view expressed in the opinion below. The opinion (Trans. 29) refers to the well-settled rule that agents will be presumed to have communicated to their principals that which it was their duty to communicate. But that presumption, as next shown, does not apply here.

**No presumption here that agents communicated knowledge of their incapacity to their principal because it would have been obviously against their interest to have done so. On contrary presumption is they concealed such knowledge. Burden of proof was on plaintiff to show actual communication. He did not do so.**

This rule

> "imputing notice is usually based * * * upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, material to the principal's protection and interests, and the presumption that he has performed this duty. *This presumption, however, it is said, will not prevail where it is certainly to be expected that the agent will not perform his duty, as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal. Much less will it be entertained where the agent is openly and avowedly acting for himself and not as agent. In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it.*"
>
> *Mechem on Agency,* Sec. Edition, Vol. 2, pp. 1399-1400.

Empatically this was a case where it was not to be expected that the agent would perform the duty of communication to the principal. This would have been a communication of Jardine, Matheson & Company's incapacity to perform the duties of the agency. It would have been in effect a resignation of the agency and, in failing to make the communication, the agent was, if ever agents are, acting in its own interest and adversely to the interest of the principal. There is not the slightest reason why *defendant* should have

desired to refuse this cargo. There was *every reason why the agent should,* for the moment it accepted the cargo it would have subjected itself to punishment at the hands of its government. It was, therefore, to its interest both to decline the cargo and not to apprise its principal of the declination. In such a case, as Mechem says in the aforequoted excerpt,

> "the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it."

This exception to the general rule that agents are presumed to have communicated what it is their duty to communicate is so important in the present connection that we venture to cite further authority as follows:

> "The rule that notice to an agent is notice to the principal does not apply when the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal; and accordingly where the agent is engaged in a transaction in which he is interested adversely to his principal or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein, unless the fraud is of such a character that its consummation will not be interfered with by imparting the knowledge of the facts acquired by the agent to his principal."

*2 C. J.* 868-70, and many cases cited.

> "The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal the rule fails when the circumstances

are such as to raise a clear presumption that the agent will not perform his duty, * * *''

*31 Cyc.* 1595.

''The general rule is, that notice of a fact acquired by an agent, while transacting the business of his principal, operates constructively as notice to the principal. This rule applies of course as well to corporations as to natural persons. *Reid v. Bank of Mobile,* 70 Ala. 199. It is based upon the principle, that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application however to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: First, that he will very likely in such case act for himself, rather than for his principal, and secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject'' (citing numerous cases).

*Frenkel v. Hudson,* 82 Ala. 158; 60 Am. Rep. 736.

''While the broad proposition is that notice to, or knowledge of, the agent is notice to, or knowledge of, the principal, and binding on the latter, there are notable exceptions to the rule. A principal is not bound where the character or circumstances of the agent's knowledge are such as to make it intrinsically improbable that he will inform his principal. Bigelow, Frauds, 239.''

*Benton v. Minneapolis Tailoring & Manufacturing Co.,* 73 Minn. 498; 76 N. W. 265.

"The reason usually given for the rule announced by the trial judge is that, if the notice is received in the line of the agent's authority, it is his duty to inform his principal, and the law presumes that he performs his duty; and that, ordinarily, on principles of public policy, the knowledge of the agent is imputed to the principal. Story, Agency, Sec. 140. There is, however, an exception to the general rule which is as well established as the rule itself. The rule has no application to a case where the agent is acting for himself, in his own interest, adversely to the interest of his principal. In such case the adverse character of his interest takes the case out of the operation of the general rule; because, first, he will be likely, in such case, to act for himself, rather than for his principal, and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be, therefore, both unjust and unreasonable to impute notice by mere construction under such circumstances."

*Union Central Life Insurance Co. v. Robinson,* 148 Fed. 358; 8 L. R. A. (N. S.) 883.

Speaking in each case for the Supreme Court of the United States, Mr. Justice Harlan in

*American Surety Co. v. Pauly,* 170 U. S. 133,

said:

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent

> unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

And Mr. Justice Lamar in

*American National Bank of Nashville v. Miller,* 229 U. S. 517,

said:

> "This presents another phase of the oft-recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject, it is unnecessary to do more than to apply them to the facts of this case. If Plant, within the scope of his office, had knowledge of a fact which it was his duty to declare, and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is then presumed to have done what he ought to have done, and to have actually given the information to his principal.
>
> "But if the fact of his own insolvency and of his personal indebtedness to the Nashville bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon bank, of which he was president, with notice of facts which the agent not only did not disclose, but which he was interested in concealing."

The case at bar is indisputably one where "the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal" (*2 C. J.* 869 and *31 Cyc.* 1595, supra), where "the character or circumstances of the agent's knowledge are such as to make it intrinsically improbable that he will inform his principal" (*Frenkel v. Hudson,* supra), where "the agent is acting for himself, in his

own interest, adversely to the interest of his principal'' and where ''he will not be likely to communicate to the principal a fact which he is interested in concealing'' (*Union Central Life Ins. Co. v. Robinson,* supra, and *American National Bank of Nashville v. Miller,* supra.

To have imparted to Swayne & Hoyt its incapacity under the British regulations would have been tantamount to a resignation on the part of Jardine, Matheson & Co., and it is not to be presumed that they would convey, but, on the contrary, that they would conceal, facts thus fatal, if known, to the continuance of their agency, and consequently against their interest.

**Presumption of communication applies only to knowledge relating to subject-matter of agency and within scope of agent's authority. British Trading With Enemy Acts etc. not within such category.**

The presumption of communication of notice from agent to principal, furthermore, applies only as to matters within the line of the agent's authority. The knowledge must relate ''to the subject-matter of the agency'' (*Mechem on Agency,* Sec. Ed., Vol. 2, p. 1399), and must be acquired ''while acting in the course of his employment and within the scope of his authority'' (*2 C. J.* 859). ''Notice to an agent in order to be notice to the principal must relate to facts so material to the purpose of the agency as to make it the agent's duty to communicate the notice to his principal'' (*31 Cyc.* 1592).

No one would argue that the British Enemy Trading Acts were a part of the subject-matter of the agency between Jardine, Matheson & Company and defendant, or material to the purpose of the agency. The subject-

matter of an agency can be nothing more nor less than the business conducted by the agent. Facts material to the purpose of any agency must be facts relating directly to the business itself and not to statutes, acts of parliament and executive orders of governments. Conceding for the sake of argument that a principal must be presumed to know matters which may be fairly considered as directly connected with the subject-matter of the agency or material to the purpose of the agency, it by no means follows that the principal is presumed to know foreign law because his agent may be located in a foreign jurisdiction. In the first place a presumption cannot be based upon a presumption (*United States v. Ross,* 92 U. S. 281). Because a principal may be presumed to know certain facts within the knowledge of his agent, namely, those relating to the subject-matter of the agency this presumption cannot be the basis of a further presumption that the principal is presumed to know other facts not connected with the subject-matter or purpose of the agency merely because his agent may have knowledge of such facts.

There is also a presumption as old as the law itself that the laws of a country have no extra territorial effect. There are some exceptions, it is true, but they do not alter the general principle. By an anomaly the laws of various foreign countries do have extra territorial effect in China. This does not, however, alter the general principle. In the absence of anything to the contrary, the presumption is that the law of foreign countries does not extend to China. As the extension

of American law to Americans in China is based upon treaty, there may be a presumption that non-resident Americans are presumed to know that such is the case. However this may be, a further presumption cannot be based upon this presumption by which Americans can be presumed to know that British subjects in China are subject entirely to British law. Much less can there be any presumption that non-resident Americans by merely appointing British agents in China are bound to know the law to which such British agents are subject. We submit that nothing short of actual knowledge can bind the principal under such circumstances.

**Not shown that agent knew of Enemy Trading Acts before taking up agency. Rule that knowledge possessed by agent prior to agency will be imputed to principal therefore not applicable even if (which we dispute) knowledge of British acts material to agency and acquired within scope of agent's authority.**

We are well aware of the rule which imputes to the principal knowledge possessed by the agent prior to taking up the duties of the agency. But it does not appear from the record in this case that when Jardine, Matheson & Company were appointed Swayne & Hoyt's agents in Shanghai, the English Trading With the Enemy Acts and other regulations and governmental inhibitions which made it impossible for them to take plaintiff's cargo were in effect. Indeed, the date of the beginning of the agency is not in evidence. Plaintiff's petition simply avers (Paragraph 5th) "that Jardine, Matheson & Company, Limited, a British corporation, were and are agents for said defendants

at said Shanghai'' and that averment is admitted in the answer (Paragraph I) and the averment and admission are the sole record of the facts in this connection, no evidence to the point having been introduced. In any event, the rule under consideration is (see *31 Cyc.*, 1593, and cases cited) confined to knowledge material to the agency and, as shown above, knowledge with reference to the British governmental inhibitions cannot be said to have been in the true sense material to this agency.

**Not shown that agents when taking agency knew effect of British Trading With Enemy Acts, etc.**

The argument so far has granted that the agents knew what the effect of the British regulations would be. But that was not necessarily so. It does not appear from the English Trading With the Enemy Acts themselves that they were intended to have the effect which they were given in this particular instance. Neither the defendant (granting for the moment that it knew of the British acts in question) nor its agent had any reason to suppose that those acts would prevent the agent from accepting cargo from an American shipper for shipment by an American ship—nor could it be foreseen that the American shipper would be acting as he was here for German interests. The situation was one which neither the agent nor the principal could foresee or guard against.

**But plaintiff knew before proffering this cargo that it could not be received.**

On the other hand, Leonard Everett, the plaintiff, came offering a cargo which he knew Jardine, Mathe-

son & Company could not touch. If he was blacklisted (and he avers in his replication—Paragraph 3d—that he was) he knew it, and he knew that meant that English subjects could not deal with him because, in the view of their government, he was German-tainted. Time was perhaps when it was the fashion to rail against the blacklist, but German intrigue has forced our government to it also and, as everyone is aware, we are practicing it with a justification that all admit and with more vigor than England ever dreamed of. No American citizen can deal with those neutrals, transactions with whom the Government has proscribed because they have been found to be subserving German interests.

When plaintiff proffered Jardine, Matheson & Company his cargo, he must have done so solely for the purpose of laying a foundation for this suit—for he knew they could not take his goods, nor hold converse with him.

Dated, San Francisco,
February 11, 1918.

Respectfully submitted,

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